Sheltering Pines Convalescent Hospital *and* Hospital and Institutional Workers Union, Local 250, Service Employees International Union. Case 20-CA-14146

April 23, 1981

DECISION AND ORDER

On July 26, 1979, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, the Union and the General Counsel filed exceptions and supporting briefs, and Respondent filed cross-exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union concerning the disbursement of moneys to employees it represents, which moneys were received by Respondent from the State of California pursuant to the provisions of state legislation—the Papan Act—intended to increase wages and related benefits in skilled nursing and intermediate care facilities. The Administrative Law Judge found no violation. The General Counsel and the Union except to the adverse findings and conclusions. We find merit in their exceptions.

Respondent owns and operates a convalescent hospital which is a skilled nursing facility in Milbrae, California, and its patients include California Medical Assistant Program (Medi-Cal) patients. Respondent's nonadministrative employees are represented for purposes of collective-bargaining by the Union except for the registered nurses who are unrepresented. The wages, hours, and other terms and conditions of employment of the bargaining unit employees are governed by a collective-bargaining agreement between the Union and Respondent effective from March 1, 1977, until February 28, 1980. Section 10 of the agreement, entitled "WAGES," established minimum hourly rates of pay for the employees and provided for a 15-cent hourly increase effective March 1, 1978, and March 1, 1979.

In February 1978 the California Legislature enacted into law the Papan Act, which increased state payments under Medi-Cal to skilled nursing and intermediate care facilities for the purpose of raising wages and related benefits paid nonadministrative personnel to competitive levels in order to reduce "turnover" among these employees and thus help to improve the level of patient care. The daily rates at which the State had previously reimbursed covered facilities for each day of care provided Medi-Cal patients were increased by a specific amount for the months of March through June 1978,[1] and the Papan Act required that during this 4-month period all increases in the State's Medi-Cal reimbursements received by a covered facility be paid out in salary and related benefit increases to nonadministrative employees. The Papan Act imposed no restriction on the manner in which the facility allocated or distributed the wage or benefit increases among its employees; however, it required restitution of all such funds not expended, plus a 10-percent interest penalty on the unexpended funds to insure full distribution.

Pursuant to the provisions of the bargaining agreement between Respondent and the Union the unit employees were, as noted, scheduled to, and did, receive a 15-cent hourly increase on March 1, 1978. During the middle of June, Union Business Representative Felix Smith was asked by the Union's steward at the hospital when the unit employees were going to receive their Papan money. Smith then asked the hospital administrator, Leona Kuhl, about disbursement of the Papan money, and was told that Respondent had distributed it in the form of the March 1, 15-cent increase to unit employees and in March 1 and May 1 increases for registered nurses. She added that the 15-cent increase to unit employees on March 1 also satisfied Respondent's contractual obligation to give such an increase on that date.

On June 26 the Union filed a grievance,[2] contending in effect that, as the March 1 increase to unit employees represented Papan money, the employees had not consequently received the March 1 contractually required increase and that they should therefore receive such increase retroactively to that date. The grievance proceeded to a third-step meeting without resolution. Thereafter, the Union stated it wanted to proceed to arbitration, but Respondent indicated it would contest such a course of action because the grievance, it maintained, had not been timely filed. The Union then filed the charge in this proceeding on October 13.[3]

As stated, the complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by refus-

[1] Respondent received from the State $2,224.87 in Papan disbursements for each of the months of March through June 1978.

[2] The collective-bargaining agreement contains a four-step grievance procedure which ends in binding impartial arbitration. The grievance procedure by its terms covers all disputes involving the interpretation of the collective-bargaining agreement. However, all grievances must be presented in writing "within 30 days of the occurrence" being complained about.

[3] We agree with the Administrative Law Judge, for the reasons stated by him, that the complaint is not barred by Sec. 10(b) of the Act, since the Union did not receive notice of Respondent's actions in question until mid-June.

ing to bargain with the Union concerning the disbursement of the Papan funds. There is no question but that Respondent did not bargain about such matters. Indeed, the Administrative Law Judge properly found that the Union received neither actual nor constructive notice concerning Respondent's decision or actions with respect to disbursement of the funds, and was, in fact, unaware of the alleged disbursement until some 2-1/2 months after it assertedly occurred. Nevertheless, as we have noted, the Administrative Law Judge found no violation, predicating his result on the ground that the Union "by entering into a collective-bargaining agreement with the Respondent which, by its terms, provides for certain wage increases during the term of the agreement . . . waived its statutory right to require the Respondent to bargain further about wage increases during the term of the agreement." He therefore recommended that the complaint be dismissed.

Having decided the case as he did, the Administrative Law Judge found it unnecessary to determine if the distribution of Papan money was—as the General Counsel contends—or was not—as Respondent contends—a mandatory subject of bargaining. We conclude that it is. Thus, the Papan funds which Respondent received were provided for the purpose of—and could be used only for—raising the wages and related benefits of Respondent's nonadministrative employees—a class including the unit employees represented by the Union. Further, Respondent had discretion under the Papan Act to determine which of its eligible employees would receive Papan wage benefits and to what extent.[4] Consequently, it is apparent that the Papan funds granted to Respondent were directly related to the terms and conditions of employment of unit employees, that Respondent's bargaining over decisions concerning the distribution of such funds was not precluded by any state or other requirements specifically directing how such funds should be spent, and that Respondent's decision concerning the funds would directly affect unit employees' terms and conditions of employment. Accordingly, we find that the distribution of the Papan funds was a mandatory subject of bargaining and thus a subject matter over which Respondent normally would be required to bargain.

As stated above, the Administrative Law Judge concluded that, by entering into its 1977–80 contract containing full wage provisions, the Union waived its statutory right to require Respondent to bargain further about wage increases during the term of the collective-bargaining agreement.[5] In the usual case the Administrative Law Judge's conclusion is, of course, correct. Wages are a mandatory subject of bargaining and the cornerstone of collective-bargaining agreements. During the course of negotiations, gain and loss factors are considered and the parties assume their respective economic risks based on current and projected marketplace conditions.[6]

The situation here, however, is highly unusual—if not unique—in that it is quite clear that the legislature was attempting to provide for a direct payment of increased wages to employees rather than provide any additional payment to the Employer for the services it rendered the State through the Medi-Cal program. Respondent was not, as in the normal situation, receiving a payment for the services it rendered. Rather, the legislature was providing additional funds to employees for the services they rendered, albeit as employees of Respondent. Respondent's only function was to allocate the wage or benefit increases among its employees. Thus, while the parties might have reasonably anticipated that during the term of the contract Respondent might receive an increase in the payment it received for services it provided which Respondent would then have to decide how to spend, they could not have anticipated that the State would provide additional payments directly to employees for wages and benefits with Respondent's only function being the allocation of the funds.[7] There-

[4] Thus, the situation here is not like that involving an increase in the Federal minimum wage where the wage increase is, in effect, set by the statute. See, e.g., *Frederick's Foodland, Inc. d/b/a Bucyrus Foodland North and Bucyrus Foodland South*, 247 NLRB No. 38 (1980).

[5] Citing in support of his result *Tide Water Associated Oil Company*, 85 NLRB 1096 (1949), and *Bloomsburg Craftmen, Inc.*, 187 NLRB 506 (1970). These cases hold that once a contract is reached parties are not obligated to bargain further during its term over established terms and conditions of employment.

[6] The cases cited at fn. 15 of the Administrative Law Judge's Decision are examples of this process. The Administrative Law Judge correctly notes that a union is not obligated to bargain further about wages for the duration of a collective-bargaining agreement which contains a provision governing wages, even though a change in the employer's business situation makes it allegedly impossible for the employer to pay the contractual wage rates *(Oak Cliff-Golman Baking Company*, 207 NLRB 1063 (1973)), or because government funds previously used to help finance labor costs have been discontinued *(Rego Park Nursing Home*, 230 NLRB 725 (1977); *Sun Harbor Manor*, 228 NLRB 945 (1977)). The Administrative Law Judge failed to add that the situations faced by the employers in the above-cited cases were risks within the contemplation of the parties at the time they entered their respective collective-bargaining agreements. As stated in *Sun Harbor Manor, supra* at 947:

> [A]bsent express or implied contractual protection against such a risk, it is one that must be taken to have been assumed. The fact that the unanticipated freeze made it difficult for Respondent to fulfill its cost obligations under the contract, warrants no different treatment than that accorded employers in other industries whose ability to finance periodic increases is seriously compromised or precluded by an unexpected decline in revenues.

[7] Negotiations for the collective-bargaining agreement ended before March 1977, the effective date of the agreement. The Papan Act was not introduced in the legislature until April 6, 1977. While conceivably there was some discussion of the proposal prior to its introduction, given the

Continued

fore, the normal waivers with respect to wage agreements simply are not applicable to the situation here.

Consequently, we find no merit in Respondent's argument that, as it did no more than comply with the contractual provisions concerning a pay raise, the dispute in this case concerns nothing more than a wholly managerial decision with respect to the disbursement of available funds, the source of such funds being an irrelevant consideration. As we have emphasized, the funds involved were funds to be given as wages and benefits to nonadministrative employees, a class including the unit employees. Thus, management was not faced with a decision, as in the normal case, concerning what source of funds to use in increasing wages and benefits, but only with the decision of how to distribute the Papan money among eligible employees. That Respondent could assertedly distribute part of the fund as a contract-specified pay raise cannot properly be employed to mask the fact that Respondent's action in this regard involved the distribution of money in which the unit employees had a legally established interest quite apart from, and in addition to, their contractually required pay raise. In these circumstances, we find that the contract does not constitute a waiver of the right to bargain with respect to the distribution of these funds.

Accordingly, we find that, by distributing Papan Act funds without affording the Union an opportunity to bargain over its distribution, Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Sheltering Pines Convalescent Hospital is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hospital and Institutional Workers Union, Local 250, Service Employees International Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees, including licensed vocational nurses, cooks, nursing attendants, housekeeping attendants, laundry attendants and kitchen helpers, employed by Respondent at its Milbrae facility, excluding registered nurses, office employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing to bargain collectively with the above-named labor organization, as the exclusive bargaining representative of all its employees in the appropriate unit, by, on or about March 1, 1978, and continuing to date, refusing to bargain with the Union concerning the disbursement of funds received from the State of California pursuant to the Papan Act for disbursement to its employees in the form of wages and/or other benefits, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

5. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. By taking unilateral action affecting the terms and conditions of employees in the appropriate unit at a time when such employees were represented by the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit concerning the distribution of Papan Act funds.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Sheltering Pines Convalescent Hospital, Millbrae, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union, as the exclusive bargaining representative of the employees in the appropriate unit described below, by refusing to bargain with the Union concerning the disbursement of funds received from the State of California pursuant to the Papan Act for disbursement to its employees in the form of wages and/or other benefits. The appropriate unit is:

> All employees, including licensed vocational nurses, cooks, nursing attendants, housekeeping attendants, laundry attendants and kitchen

uncertainties of the legislative process we see no reason to find a waiver of the right to bargain in this area merely because there is such a proposal absent evidence, not present here, that bargaining on the subject was in fact waived.

helpers, employed by Respondent at its Millbrae facility, excluding registered nurses, office employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Upon request, bargain collectively and in good faith with the above-named labor organization, as the exclusive representative of all the employees in the unit described above, with respect to the distribution of Papan Act funds.

(b) Post at its facility in Millbrae, California, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

MEMBER ZIMMERMAN, dissenting:

The majority today finds that Respondent violated Section 8(a)(5) of the Act by refusing to bargain over the distribution of funds received by it pursuant to the Papan Act. That Act, as the majority notes, increased the State's reimbursement to nursing and intermediate care facilities by a specific amount during a 4-month period for the purpose of increasing wages and other benefits paid to nonadministrative employees of such institutions. It is undisputed that Respondent did not bargain with the representative of the unit employees concerning the use of the Papan Act funds. Rather, Respondent applied those funds to defray the cost of a 15-cent hourly increase which the unit employees received pursuant to the collective-bargaining agreement that was in effect from March 1, 1977, to February 28, 1980.

The Papan Act contains no reference to the impact of the funds provided on existing collective-bargaining agreements. Had the legislation required that employees receive wage increases without regard to existing collective-bargaining agreements, or simply mandated payments in addition to any wage increases already scheduled for any reason, such provisions might have negated the waivers which normally attach once the parties enter into such agreements. Since the legislation is silent in this regard, there is not a sufficient basis for concluding that the Union had a right to require Respondent to bargain over a subject already covered by the existing collective-bargaining agreement during its term. As the Administrative Law Judge noted, Respondent fulfilled its obligations under that agreement.

Certainly, the Act would not permit Respondent to complain over the Union's failure to reopen wage negotiations had Respondent faced a decrease in its state reimbursements. I would apply the same standard here, where Respondent has unexpectedly received additional funds to defray its labor costs.

For these reasons, and as more fully explicated by the Administrative Law Judge, I do not find that Respondent was under any duty to bargain over its application of the Papan Act moneys, and that it fulfilled its obligations under the Act by abiding by the terms of the agreement it negotiated. Accordingly, I dissent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to bargain collectively with Hospital and Institutional Workers Union, Local 250, Service Employees International Union, as the exclusive bargaining representatives of our employees in the unit described below, by refusing to bargain with the Union concerning the disbursement of funds received from the State of California pursuant to the Papan Act for disbursement to our employees in the form of wages and/or benefits. The unit is:

All employees, including licensed vocational nurses, cooks, nursing attendants, housekeeping attendants, laundry attendants and kitchen helpers, employed by Respond-

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ent at its Millbrae facility, excluding registered nurses, office employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL, upon request, bargain collectively with Hospital and Institutional Workers Union, Local 250, Service Employees International Union, as the representative of our employees in the above-described appropriate unit, concerning the disbursement of funds received from the State of California pursuant to the Papan Act for disbursement to our employees in the form of wages and/or benefits.

SHELTERING PINES CONVALESCENT HOSPITAL

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: The hearing in this case was held June 12, 1979, and is based on an unfair labor practice charge filed on October 13, 1978, by the Hospital and Institutional Workers Union, Local 250, Service Employees International Union, herein called the Union, and an amended complaint issued May 21, 1979, by the General Counsel of the National Labor Relations Board alleging that Sheltering Pines Convalescent Hospital, herein called Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, herein called the Act, by refusing to bargain with the Union concerning the disbursement of moneys to employees represented by the Union, which moneys were received by Respondent from the State of California to pay employees wages or related benefits. Respondent filed an answer to the amended complaint denying the commission of the alleged unfair labor practices.[1]

Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the parties' briefs, I make the following:

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Papan Act*

Respondent owns and operates a convalescent hospital in Millbrae, California. It is a skilled nursing facility, which during the time material herein serviced approximately 120 patients, of whom approximately 35 were California Medical Assistant Program (herein called Medi-Cal) patients.

In February 1978 the California Legislature enacted into law the Papan Act (AB1426) which increased state payments under the California Medical Assistance Program to skilled nursing and intermediate care facilities. The purpose of these benefit increases in State Medi-Cal payments was to increase wages and related benefits paid nonadministrative personnel to competitive levels in order to reduce "turnover" among these employees, and thus help to improve the level of patient care. Under the Papan Act, the daily rates at which the State had previously reimbursed covered facilities for each day of care provided Medi-Cal patients was increased by a specific amount for the months of March through June 1978. During these months each facility which received this increase was required to increase nonadministrative employees' salaries or related benefits in amounts which, in the aggregate, equalled the total of the increase in Medi-Cal reimbursements. The Papan Act required that during this 4-month period all increases in the State's Medi-Cal reimbursements received by a covered facility be paid out in salary and related benefit increases.[2] However, the Papan Act imposed no restriction on the manner in which the facility allocated or distributed the wage or benefit increase among its employees. Upon the expiration of the first 4 months under the Papan Act (March 1–June 30, 1978), the Papan Act provided for what amounted to minimum wage rates which are not specified in fixed dollar amounts. Rather, the Papan Act provides for minimum wages which depend on the Federal minimum wage, an employee's duration of employment, and both the average wage increase given and the actual wages paid in the first 4 months of the Papan Act. An employee employed less than 3 months must receive a wage of at least the sum of the Federal minimum wage plus half of "the average hourly pay increase,"[3] put into effect during the first 4 months under the Act. Employees of more than 3 months' tenure must receive a wage which is either not less than the sum of the Federal minimum wage plus all of the "average hourly lay increase" paid in March through June 1978 or is not less than the wages they received in the first 4 months of the Papan Act, whichever is greater.

B. *The Facts: A Chronology*

The nonadministrative employees employed by Respondent's convalescent hospital are represented by the Union, except for the registered nurses who are unrepresented. The wages, hours, and other terms and conditions of employment of the employees represented by the Union are governed by a collective-bargaining agreement between the Union and Respondent, effective from

[1] Respondent admits that the Union is a labor organization within the meaning of Sec. 2(5) of the Act and that Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and meets the Board's applicable discretionary jurisdictional standard.

[2] The Papan Act required restitution to the State of all such funds not expended, plus a penalty of 10 percent of the unexpended funds, to insure full disbursement of these funds.

[3] The "average hourly pay increase" was determined in substance by dividing the total monthly increase in Medi-Cal reimbursements received by a facility under the Papan Act by the monthly straight time hours worked by nonadministrative employees. It amounted, in short, to an average of the actual wage increases put into effect in the first 4 months of the Act.

March 1, 1977, until February 28, 1980. Section 10 of the agreement, entitled "WAGES," establishes minimum hourly rates of pay for the employees and provides for a 15-cent hourly pay increase effective March 1, 1978, and March 1, 1979. The collective-bargaining agreement was negotiated prior to the passage of the Papan Act and there was no discussion during negotiations about what would happen in the event the Papan Act or similar legislation was enacted during the life of the agreement.

Pursuant to the Papan Act, Respondent received $2,224.81 a month for the months of March through June 1978, from the State of California. Respondent was obligated under the law to disburse this money to its nonadministrative employees in the form of wages or related benefit increases. Respondent employed approximately 47 nonadministrative employees. Thirty-four were covered by the collective-bargaining agreement and scheduled as of March 1, 1978, to receive a 15-cent-an-hour pay raise under that agreement. Thirteen, who were registered nurses, were not covered by the agreement. The Papan Act did not require Respondent to distribute the Papan moneys to any particular group of employees or equally among employees or to allot the moneys in any particular fashion. Respondent used the Papan moneys to contribute toward the financing of a 15-cent-an-hour pay raise for all of its nonadministrative employees (those covered by the collective-bargaining agreement and the registered nurses) effective March 1, 1978,[4] and to contribute toward an additional 50-cent-an-hour pay raise for the registered nurses effective May 1, 1978. Respondent did not notify the Union about the distribution of the Papan moneys until June 1978 when, as described *infra*, Hospital Administrator Kuhl spoke to Union Business Representative Smith.

During mid-June 1978, the employee who was the Union's steward at the convalescent hospital asked Union Business Representative Felix Smith when Respondent's employees were going to receive their Papan moneys; explaining to Smith that the employees had only received the 15-cent-an-hour pay raise provided for in the collective-bargaining agreement. Also, other employees informed Smith "they were under the impression that they had received the Papan money."

On June 21, 1978, within 3 or 4 days after Smith's conversation with the Union's steward, he spoke to the convalescent hospital's administrator, Leona Kuhl, and asked what the hospital had done with the Papan moneys. Kuhl told him that Respondent already had distributed the Papan moneys to the employees in the form of a 15-cent-an-hour pay raise granted March 1, 1978; and on May 1, 1978, had granted the registered nurses an additional 50-cent-an-hour pay raise. Smith asked what Kuhl intended to do about the 15-cent-an-hour pay raise effective March 1, 1978, required under the collective-bargaining agreement. Kuhl answered that the 15-cent-an-hour pay raise granted the employees on March 3, 1978, satisfied Respondent's collective-bargaining obligation.[5]

On June 26, 1978, Union Business Representative Smith, on behalf of the Union, filed a written grievance against Respondent; charging that Respondent had violated the "wage scale" section of the collective-bargaining agreement because "employees were not paid the contractual wage rates effective March 1, 1978," and to remedy this grievance asked "that employees be paid with interest retroactively the 15 cents from March 1, 1978, to the present."[6]

On August 22, 1978, Union Business Representatives Felix Smith and Francis DeMello met with Respondent's Representatives Robert Atwood[7] and Leona Kuhl to discuss the Union's grievance at a second-step grievance meeting. The Union's position, as expressed at this meeting, in essence was that the 15-cent-an-hour pay raise granted to the employees on March 1, 1978, did not satisfy Respondent's contractual obligation because the moneys used to pay this wage increase were Papan moneys, thus, according to the Union, Respondent was obligated to pay the employees another 15-cent-an-hour pay raise retroactive to March 1, 1978. The union representatives stated that Papan moneys could not be used for contractual wage increases. In reply, Respondent's representatives took the position that the source of the moneys used by Respondent to finance the employees' pay raise, called for by the collective-bargaining agreement, was immaterial so long as Respondent paid the raise called for by the agreement. The meeting ended with the parties adhering to their respective positions.[8]

On September 12, 1978, Union Business Representatives Smith, DeMello, and Gilchrist met with Respondent's representatives, Atwood and Sheldon, to discuss the Union's grievance at a third-step grievance meeting. Smith took the position that the 15-cent-an-hour pay raise granted by Respondent on March 1, 1978, did not satisfy Respondent's contractual obligation to pay the employees a 15-cent-an-hour pay raise on that date because the moneys used for the increase were Papan moneys. Atwood asked what the Union relied on to support its contention that Papan moneys could not be used to finance contractual wage increases. In reply DeMello pointed to the portion of the Papan Act which states that wage increases required by the Papan Act "shall be in addition to any future mandatory increases required by federal or state law." Also, the union representatives claimed that the Union had filed unfair labor practice charges against another hospital which involved a similar situation and that the charges had been found to be meri-

[4] The wage increase was actually paid to the employees on March 20, 1978.

[5] Smith and Kuhl testified about this conversation. Their testimony concerning the significant parts of this conversation is not in conflict. Accordingly, the description of the pertinent portion of this conversation which has been set forth in the text, is based on a composite of their testimony.

[6] The collective-bargaining agreement contains a four-step grievance procedure which ends in binding impartial arbitration. The grievance procedure by its terms covers all disputes involving the interpretation of the collective-bargaining agreement. However, all grievances must be presented in writing "within 30 days of the occurrence" being complained about.

[7] Atwood is employed by the California Association of Employers, an employer association which represents Respondent in its dealings with the Union.

[8] Atwood, Smith, and DeMello testified about this meeting. On matters of significance their testimony is not for the most part in conflict. However, whenever there is a conflict I have credited Atwood's testimony because he impressed me as the more credible witness.

torious by the National Labor Relations Board's Regional Office. Atwood stated that he disagreed with the Union's interpretation of the Papan Act and rejected the Union's grievance because it was not filed within 30 days of the occurrence as required by the contractual grievance procedure, and because Respondent had complied with its contractual obligation by granting the employees a 5-cent-an-hour pay raise effective March 1, 1978. Atwood also stated that he would check into the NLRB case referred to by the Union and contact the Union at a later date.[9]

During the latter part of September 1978 or early in October 1978, Atwood phoned Smith and advised him that he had checked into the NLRB case cited by Smith at the third-step grievance meeting and felt that the case was not applicable to Respondent's situation and stated that Respondent's position remained unchanged. Smith stated that the Union wanted to proceed to arbitration with its grievance. Atwood indicated that Respondent would contest such a course of action because the Union's grievance was not timely filed. Smith indicated the Union would do what had to be done.

On October 13, 1978, the Union filed the instant unfair labor practice charge alleging that Respondent, in violation of Section 8(a)(5) and (1) of the Act, "has refused to comply with the wage provisions of the collective-bargaining agreement as [sic] unilaterally given wage increases and increments to employees which are not consistent with the collective bargaining agreement."

B. *The Parties' Contentions*

The General Counsel contends that the distribution of the Papan moneys constitutes a mandatory subject of bargaining[10] and that, by distributing this money without affording the Union an opportunity to bargain about its distribution, Respondent violated Section 8(a)(5) and (1) of the Act. Respondent takes the position that during the term of its collective-bargaining agreement with the Union it is not obligated to bargain about the distribution of moneys for employees' wage increases so long as it complies with the wage provisions of the agreement. Respondent further contends that any unfair labor practices are barred by the time limitation in Section 10(b) of the Act.

C. *Ultimate Conclusions*

Section 10(b) of the Act precludes the issuance of complaints based on unfair labor practices occurring more than 6 months before the filing of a charge. *Local Lodge No. 1424, International Association of Machinists, AFL-CIO [Bryan Manufacturing Co.]* v. *N.L.R.B.*, 362 U.S. 411 (1960). The charge in the instant case was filed on October 13, 1978, thus, the cutoff date for 10(b) purposes is April 13, 1978. Respondent urges that, because Respondent's disbursement of the Papan moneys used to finance the employees' wage increase commenced on March 20, 1978, a finding of a violation is time-barred under the Act.

The Board, with court approval, has consistently held that the Act's statute of limitations does not begin to run until the aggrieved party knew or should have known that his statutory rights were violated. *N.L.R.B.* v. *Allied Products Corporation, Richard Brothers Division*, 548 F.2d 644, 650 (6th Cir. 1977); *Wisconsin River Valley District Council of the Brotherhood of Carpenters and Joiners of America, AFL-CIO [Skippy Enterprises, Inc.]* v. *N.L.R.B.*, 530 F.2d 47, 53-54 (7th Cir. 1976).[11] The record establishes that it was in June 1978 when the Union first learned or should have learned that Respondent had distributed the Papan moneys. Respondent did not notify the Union about the disbursement of the Papan moneys until June 1978 when Union Business Representative Smith spoke to Respondent's Administrator Kuhl about the matter.[12] And there is insufficient evidence that prior to April 13, 1978, the Union, with the exercise of reasonable diligence, should have discovered from the facts of which it was aware that Respondent had distributed the Papan moneys. In this regard, the employees represented by the Union were scheduled to receive a 15-cent-an-hour contractual pay raise effective March 1, 1978. Thus, the fact that they received their pay raise as scheduled was not reasonably calculated to place the Union or the employees on notice that Respondent had financed the increase in whole or in part with the Papan moneys, particularly since there is no evidence that Respondent informed the employees it had used the Papan moneys to finance the March 1, 1978, increase.[13]

Based on the foregoing, I am of the opinion that the Union, until June 1978, did not receive either actual or constructive notice of the conduct which constitutes the alleged unfair labor practice; thus, the Board is not prevented by Section 10(b) of the Act from finding a violation herein.

It is undisputed that Respondent on March 20, 1978, used the Papan moneys to finance a pay raise, in whole or in part, for employees represented by the Union without first affording the Union an opportunity to bargain about the distribution of the moneys. It is this unilateral conduct which the General Counsel urges violated Respondent's bargaining obligation within the meaning of

[9] Atwood, Smith, and DeMello testified about this meeting. In those instances where there is a conflict in their testimony, I have credited Atwood's testimony inasmuch as he impressed me as the more credited witness.

[10] In view of the conclusion I have reached herein, I find it unnecessary to consider or pass upon this contention.

[11] The instant case does not involve fraudulent concealment. However, as illustrated by the cited cases, it is not necessary to prove fraudulent concealment in order to toll the Act's statute of limitations.

[12] Although employers under the Papan Act were supposed to increase employees' wages or related benefits with Papan moneys effective March 1, 1978, the employers could do this any time between March 1, 1978, and June 30, 1978, so long as the wage increases were retroactive to March 1, 1978. Accordingly, the Union should not have known that Respondent would immediately commence distributing the Papan moneys.

[13] The sole evidence on this subject is Smith's testimony that employees told him "they were under the *impression* that they had received the Papan money." (Emphasis supplied.) The record does not establish the date on which Smith received this information. And since Smith testified that this was the information which triggered his June 1978 meeting with Kuhl, it indicates that he received the information shortly before that meeting. In any event, mere suspicion, rumors, or impressions are not "factually sufficient to sustain a finding of 'notice' within the meaning of Section 10(b) of the Act." *Wisconsin River Valley District Council, etc., supra*, 54.

Section 8(a)(5) of the Act. Respondent, without conceding that the distribution of the Papan moneys is a mandatory subject of bargaining, takes the position that during the term of the governing collective-bargaining agreement it was not obligated under the Act to bargain about the distribution of the Papan moneys as long as in granting pay raises Respondent complied with the wage provisions of the collective-bargaining agreement. I agree with Respondent.

During all times material herein Respondent and the Union were parties to a collective-bargaining agreement, which contained provisions pertaining to employee's pay raises. Respondent, in financing the employees' pay raises with the Papan moneys, took no action in derogation of the provisions of that agreement. Quite the opposite, Respondent complied with the wage provisions of that agreement. The General Counsel, in alleging that Respondent was obligated to bargain about the disbursement of the Papan moneys, is in effect urging that Respondent was obligated to bargain further about employees' wages, even though this subject was embodied in the governing collective-bargaining agreement.[14] This is contrary to existing law inasmuch as it is settled that "as to the writtem terms of the contract [both Respondent and the Union] may refuse to bargain further about them . . . ." *Tide Water Associated Oil Company*, 85 NLRB 1096, 1099 (1949). For, "under Section 8(d) of the Act, once a bargaining agreement has been executed by a union and an employer establishing terms and conditions for a 'fixed period', neither party is under the duty 'to discuss or agree to any modification' of these terms or conditions during the contract period." (Emphasis supplied.) *Bloomsburg Craftsmen, Inc.*, 187 NLRB 506 (1970).[15]

Based on the foregoing, I find that, by entering into a collective-bargaining agreement with Respondent which, by its terms, provides for certain wage increases during the term of the agreement, the Union has waived its statutory right to require Respondent to bargain further about wage increases during the term of the agreement. It is for this reason that I shall recommend that the amended complaint be dismissed in its entirety.

[Recommended Order for dismissal omitted from publication.]

[14] The amended complaint is worded in terms of a refusal to bargain about the disbursement of the Papan moneys rather than a refusal to bargain about employees' wages. However, the disbursement of the Papan moneys creates a statutory duty to bargain only insofar as the disbursement affects employees' terms and conditions of employment, in other words affects their wages.

[15] A union is not obligated to bargain further about wages for the duration of a collective-bargaining agreement which contains a provision governing wages, even though a change in the employer's business situation makes it impossible for the employer to pay the contractual wage rates *(Oak Cliff-Golman Baking Company*, 207 NLRB 1063) (1973), or because government funds previously used to help finance labor costs have been discontinued. *Rego Park Nursing Home*, 230 NLRB 725 (1977); *Sun Harbor Manor*, 228 NLRB 945 (1977). An even-handed application of the Act would seem to likewise permit an employer to refuse to honor a union's request to negotiate about wages, during the term of a contract which contains a provision governing wages, even though the employer has received an unexpected sum of money, not contemplated when the contract was entered into, which would enable the employer to pay increased wages.